

STATEMENTS OF ISSUES PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT CORRECTLY RULED THAT IOWA CODE SECTION 692A.2A VIOLATED THE UNITED STATES AND IOWA CONSTITUTIONS?

*F.K. v. Iowa Dist. Ct.*, 630 N.W.2d 801 (Iowa 2001).

*Seeman v. Iowa Dep't of Human Servs.*, 604 N.W.2d 53 (Iowa 1999).

Iowa Code Sec. 692A.2A (2003).

A. WHETHER SECTION 692A.2A VIOLATES THE SUBSTANTIVE DUE PROCESS RIGHTS OF KEITH AND OTHER OFFENDERS?

U.S. CONST. amend. XIV.

Iowa Const. art. I, sec. 9.

*In re Detention of Garren*, 620 N.W.2d 275 (Iowa 2000).

*Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed. 2d 100 (1990).

*Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed. 2d 662 (1986).

*Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed. 2d 618 (1978).

*Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

*Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed. 2d 1010 (1967).

*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed.1655 (1942).

*Johnson v. Texas*, 672 So. 2d 621 (Tx. Ct. App. 1984).

*State v. Khamjoi*, No. 03-0254, 2003 Iowa App. LEXIS 779 (Iowa Ct. App. Sept. 10, 2003).

*Attorney Gen. of New York v. Soto-Lopez*, 376 U.S. 898, 106 S.Ct. 2317, 90 L.Ed. 2d 899 (1986).

*Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed. 2d 306 (1974).

*Johnson v. City of Cincinnati*, 310 F.3d 484 (6<sup>th</sup> Cir. 2002), cert. denied, 535 U.S. 1034, 122 S.Ct. 1790, 152 L.Ed. 2d 649 (2003).

*United States v. Wheeler*, 254 U.S. 281, 41 S.Ct. 133, 65 L.Ed. 2d 270 (1920).

*Smith v. Turner*, 48 U.S. (7 How.) 283, 12 L.Ed. 702 (Taney, C.J., dissenting) (1848).

*Kent v. Dulles*, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed. 2d 1204 (1958).

*City of Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed. 2d 67 (1999).

*Aptheker v. Secretary of State*, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed. 2d 992 (1964) (Douglas, j. concurring).

*Peratrovich v. Alaska*, 903 P.2d 1071 (Ak. Ct. App. 1995).

*Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed. 2d 420 (1988).

*In re Interest of K.M.*, 653 N.W.2d 602 (Iowa 2002).

B. WHETHER SECTION 692A.2A VIOLATES THE PROCEDURAL DUE PROCESS RIGHTS OF KEITH AND OTHER OFFENDERS.

U.S. CONST. amend. XIV.

Iowa Const. art. I, sec. 9.

*In re Detention of Morrow*, 616 N.W.2d 544 (Iowa 2000).

*F.K. v. Iowa Dist. Ct.*, 630 N.W.2d 801 (Iowa 2001).

*Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976).

*In re Interest of A.H.*, 516 N.W.2d 867 (Iowa 1994).

*J.L.N. v. Alabama*, 2002 Al. Crim. App. LEXIS 231 ) Al. Crim. App. 2002).

Al. Code Sec. 15-20-26(b) (1975).

*Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed. 2d 674 (1992).

*Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed. 2d 618 (1978).

*Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed. 2d 1010 (1967).

*Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed. 2d 52 (1974).

Iowa Code Sec. 692A.2A (2003).

*Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 2d 1042 (1923).

*United States v. Cothran*, 855 F.2d 749 (11<sup>th</sup> Cir. 1988).

*Cobb v. Mississippi*, 437 So. 2d 1218 (Ms. 1983).

*Martin v. Bd. of Parole*, 957 P.2d 1210 (Or. 1998).

C. WHETHER SECTION 692A.2A VIOLATES THE EX POST FACTO CLAUSES OF THE UNITED STATES AND IOWA CONSTITUTIONS?

U.S. CONST. art. I, sec. 10.

Iowa Const. art. I, sec. 21.

*Schreiber v. State*, 2003 Iowa Sup. LEXIS 141 (Iowa July 16, 2003).

*Bezell v. Ohio*, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1945).

*State v. Corwin*, 616 N.W.2d 600 (Iowa 2000).

*State v. Pickens*, 558 N.W.2d 396 (Iowa 1997).

*DeVeau v. Braisted*, 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed. 2d 1109 (1960).

*Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed. 2d 164 (2003).

*Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed. 2d 644 (1963).

*Burnstein v. Jennings*, 231 Iowa 1280, 4 N.W.2d 428 (1942).

*United States v. Cothran*, 855 F.2d 749 (11<sup>th</sup> Cir. 1988).

*Cobb v. Mississippi*, 437 So. 2d 1218 (Ms. 1983).

*Martin v. Bd. of Parole*, 957 P.2d 1210 (Or. 1998).

*Peratrovich v. Alaska*, 903 P.2d 1071 (Ak. Ct. App. 1995).

*Ohio v. Burnett*, 755 N.E.2d 857 (Oh. 2001).

D. WHETHER SECTION 692A.2A VIOLATES THE RIGHT AGAINST SELF-INCRIMINATION?

U.S. CONST. amend. V.

U.S. CONST. amend. XIV.

*Schertz v. State*, 380 N.W.2d 404 (Iowa 1985).

*In re Interest of C.H.*, 652 N.W.2d 144 (Iowa 2002).

*Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed. 2d 409 (1973).

*Lefkowitz v. Turley*, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed. 2d 274 (1973).

*In re Interest of E.H. III*, 578 N.W.2d 243 (Iowa 1998).

Iowa Code Sec. 692A.2 (2003).

Iowa Code Sec. 692A.7 (2003).

Iowa Code Sec. 692A.2A (2003).

#### INTEREST OF AMICUS

The Iowa Civil Liberties Union [ICLU] is a private, nonprofit membership corporation founded in 1935 as an affiliate of the American Civil Liberties Union. The ICLU has over 2,500 members within the State of Iowa who will be potentially affected by the outcome of this litigation. The mission of the ICLU and the common interest of its members are to preserve and protect fundamental constitutional rights such as those embodied within the Iowa Bill of Rights and the Amendment to the United States Constitution.

In pursuit of its mission, the ICLU has been an active and zealous advocate in the courts, serving variously in the role of active litigant, counsel for directly interested parties, litigation sponsor, and as *amicus curiae*. The ICLU is presently litigating a case in the Iowa

federal court alleging that Iowa Code section 692A.2A, the subject of this appeal, is unconstitutional.

The present appeal addresses a number of constitutional issues - - substantive and procedural due process, ex post facto, and the right against self-incrimination. The appeal involves novel questions of constitutional law and an issue of first impression - - the constitutionality of Iowa Code section 692A.2A. The potential for either lasting damage citizens of Iowa and other states subject to section 692A.2A is great.

ICLU appears as *amicus* so that it can better assist the Court by providing a clearly reasoned voice for many unrepresented sex offenders who, by the force of any precedent created, may never gain a practical opportunity to litigate such important questions for their own benefit. ICLU's legal perspective should augment the briefing efforts of the litigants because its position may depart from the views advanced by the parties.

#### STATEMENT OF THE CASE

Nature of the Case. The State appeals the Ruling granting Appellee Keith Frederick Seering's Motion to Dismiss for Failure to State a Constitutional Claim entered on April 30, 2003 [Ruling].

Course of Proceedings and Disposition. Amicus curiae hereby adopts the State's Course of Proceedings and Disposition.

Statement of Facts. Appellee Keith Frederick Seering [“Keith”] was convicted of lascivious acts with a child in Johnson District Court in October, 2000 [Ruling]. The victim was his fifteen year old daughter [Ruling]. Keith received a suspended sentence and placed on probation [Ruling]. His probation was subsequently revoked and he served the remainder of his sentence at Hope House in Iowa City [Ruling].

Nancy Seering, Keith’s wife of thirty years, and their daughter moved to a trailer located at 209 North Washburn, Riverside, on or about July 1, 2002, because they could no longer afford the payments at their former residence [Ruling]. They stayed with close friends with two children at the Riverside address [Ruling]. Hope House released Keith in August, 2002, and he joined his family at the Riverside address [Ruling].

On August 9, 2002, Keith met with Sergeant Lyle Hansen, the law enforcement officer designated to register sex offenders in Washington County [Ruling]. Keith completed the paperwork for the registry [State’s Exhibit 7; Ruling]. Hansen then informed Keith that the Riverside residence violated the “2000-foot rule” enacted by the Iowa legislature and which became effective July 1, 2002 [Ruling]. Keith responded that the address was only temporary and that he was seeking a permanent residence in Johnson County [Ruling].

Hansen reviewed a map, prepared by Pete Buckingham, Washington County Geographical Information System Coordinator, of the “sex offender buffer zones” in Riverside [Defendant Exhibit A-5; Ruling]. He saw that the Riverside address was not a legally acceptable address [Ruling]. Hansen visited Keith at the address on September 4, 2002, and told Keith that he would have one week to find a new place to live [Ruling]. Hansen again visited Keith on September 25, 2002, at the Riverside address [Ruling]. Keith told Hansen that he was living out of his automobile [Ruling]. Hansen did not believe Keith and arrested him for violation of the registration requirements for sex offenders [Ruling].

Keith was initially released on his own recognizance [Ruling]. His conditions for release were modified on November 7, 2002, requiring to be supervised by the Department of Corrections and follow its rules [Ruling]. His pretrial release was revoked on January 22, 2003, because he did not maintain a suitable residence and moved several times without his supervising officer’s permission [Ruling].

Dr. Dave McEchron, a Ph.D. psychologist in private practice for thirty-five years, testified for the State at the hearing on Keith’s motion to dismiss. His practice consisted of treatment of sex offenders for over twenty-five years [Ruling]. He evaluated offenders for court and conducted research in the field of sex offender treatment [Ruling].

While he thought that it was reasonable to restrict access to children if the offender had child victims, Dr. McEchron acknowledged that no hard data existed demonstrating what was a “safe distance” for the offender to stay away from children [Ruling]. He also believed that a life long restriction “did not sound fair [because] it did not motivate the individual” in treatment [Ruling]. Such a residential restriction could cause the offender to become depressed making him more likely to reoffend [Ruling]. In addition, the residential restriction could prevent offenders from residing with their families and thereby depriving the offender of family support [Ruling]. This loss of family could lead the offender to reoffend [Ruling].

Ron Mullin, a parole/probation officer for the Eighth Judicial District and another State witness, shared Dr. McEchron’s concerns [Ruling]. His lengthy experience with sex offender included being a counselor in the Mt. Pleasant sex offender treatment unit [Ruling]. Mullin emphasized that each offender’s treatment must be individualized [Ruling].

Mullin testified that external controls, such as residential restrictions, while important early in the offender’s treatment, needed to be subsequently relaxed so that the offender could gain more internal controls [Ruling]. He believed that the residency requirement created a problem in the offender’s treatment by making

it very difficult for the offender to find an appropriate residence while on parole or probation [Ruling]. Mullin knew of no guidelines concerning the number of feet from a school or daycare because it created “a false indication of safety” nor was he aware of any studies or literature indicating that the 2000 feet guaranteed safety against sex offender’s predation [Ruling]. He agreed with Dr. McEchron that no studies existed showing a correlation between a sexual offender’s residence and the safety of children [Ruling].

Hansen, the State’s final witness, expressed concern that an offender, knowing that he could be prosecuted for revealing his address, would simply choose not to register [Ruling]. This could lead to less available and accurate information regarding the whereabouts of sex offenders [Ruling].

Nancy testified for her husband [Ruling]. She attempted to move to an address where Keith could live after his arrest [Ruling]. The family lived in a fold-down camper in a yard in Lone Tree, Iowa, from October, 2002, until early January, 2003, when the owner of the property wanted the camper removed from the property [Ruling]. She returned to the Riverside property knowing that the family would have to live apart from Keith [Ruling]. She searched diligently for a residence where the whole family could live together [Ruling].

Most of the residences were unaffordable on the family’s limited income [Ruling]. Nancy only receives social security disability

payments [Ruling]. At the time of the hearing Keith worked part-time hours [Ruling]. Nancy's search was also complicated because she does not drive [Ruling]. The repairs needed on the family vehicle rendered it unreliable [Ruling]. The affordable residences found by Nancy violate the 2000 foot rule [Ruling]. She resided in a homeless shelter at the time of the hearing [Ruling]. Keith's daughter and former victim testified that she wanted to be with her dad [Ruling].

Other facts will be set out below.

#### ROUTING STATEMENT

Amicus agrees with the Appellant's Routing Statement and requests that the Iowa Supreme Court retain this case. Iowa R. App. P. 6.401.

#### ARGUMENT

- I. THE TRIAL COURT CORRECTLY RULED THAT IOWA CODE SECTION 692A.2A VIOLATED THE UNITED STATES AND IOWA CONSTITUTIONS.

Preservation of Error. Amicus agrees that Appellant preserved error.

Standard of Review. The Iowa Supreme Court reviews a constitutional claim de novo. *F.K. v. Iowa Dist. Ct.*, 630 N.W.2d 801, 805 (Iowa 2001). If, however, the defendant challenges the statute on its face, the specific facts of the case are irrelevant because the

defendant asserts the statute is void for all purposes and under all factual situations. *Id.* Amicus contends that section 692A.2A is unconstitutional on its face and as applied to the Appellee's case.

A strong presumption exists that a statute is constitutional. *Id.* A constitutional challenge prevails "only upon proof that the act clearly infringes constitutional rights and then only if every reasonable basis for support is negated. *Id.* at 805-06 (quoting *Seeman v. Iowa Dep't of Human Servs.*, 604 N.W.2d 53, 60 (Iowa 1999)).

The trial court found Iowa Code section 692A.2A unconstitutional on the grounds that the statute violated substantive due process, procedural due process, the ex post facto clause and the defendant's fifth amendment rights against self-incrimination [Ruling]. Section 692A.2A states the following:

1. For purposes of this section, "*person*" means a person who has committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor.
2. A person shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility.
3. A person who resides within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school, or a child care facility, commits an aggravated misdemeanor.
4. A person residing within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility does not commit a violation of this section if any of the following apply:
  - a. The person is required to serve a sentence at a jail, prison,

juvenile facility, or other correctional institution or facility.

- b. The person is subject to an order of commitment under chapter 229A.
- c. The person has established a residence prior to July 1, 2002, or a school or child care facility is newly located on or after July 1, 2002.
- d. The person is a minor or a ward under a guardianship.

Iowa Code Sec. 692A.2A (2003).

A. SECTION 692A.2A VIOLATES THE SUBSTANTIVE DUE PROCESS RIGHTS OF KEITH AND OTHER OFFENDERS.

The Fourteenth Amendment of the United States Constitution provides that “no State . . . deprive any person of life, liberty , or property, without due process of law . . . U.S. CONST. amend. XIV. See *also* Iowa Const. art. I, sec. 9. The Iowa courts consider the due process clauses in the federal and state constitutions to be equal in scope, import and purpose. *In re Detention of Garren*, 620 N.W.2d 275, 284 (Iowa 2000). This court has stated that “[u]nder principles of substantive due process, the government is prohibited from engaging in arbitrary or wrongful actions ‘regardless of the fairness of the procedures used to implement them.’” *Id.* (citing *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed. 2d 100, 113 (1990) quoting *Daniels*

*v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed. 2d 662, 668 (1986)).

The Due Process Clauses protect the right “to marry, establish a home, and bring up children.” *Zablocki v. Redhail*, 434 U.S. 374, 384, 98 S.Ct. 673, 680, 54 L.Ed. 2d 618, 629 (1978) quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 2d 1042,1045 (1923)). “Marriage is one of the ‘basic civil rights of man’ fundamental to our very existence and survival.” *Id.* at 383, 98 S.Ct. at 679, 54 L.Ed. 2d at 629 (quoting *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 1824, 18 L.Ed. 2d 1010, 1018 (1967) quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655, 1660 (1942)). The Court has described marriage as “fundamental to the very existence and survival of the race.” *Id.* at 384, 98 S.Ct. At 680, 54 L.Ed. 2d at 629 (quoting *Skinner*, 316 U.S. 541, 62 S.Ct. at 1113, 96 L.Ed. at 1660).

The Texas Court of Appeals found that a probation provision banishing the defendant from a county restricted the defendant's liberty in *Johnson v. Texas*. *Johnson v. Texas*, 672 So. 2d 621, 623 (Tx. Ct. App. 1984). The defendant was convicted of unauthorized use of an automobile and sentenced to prison. *Id.* at 622. After serving a period of time, the trial court suspended the sentence and placed the defendant on probation. *Id.* A condition of the probation was not he was to reside a certain county. *Id.* The defendant appealed from the revocation of his

probation. *Id.* at 621-22. The appellate court ruled that the trial court abused its discretion because “banishing [the defendant] from the county, particularly when he is broke and unemployed [was] not reasonably related to his rehabilitation, and unduly restrict[ed] his liberty.” *Id.* at 623.

Amicus believes also that the residency restriction is analogous to barring an individual from a prescribed area and, therefore, implicates the right to travel. Iowa courts have recognized that interstate travel is a “fundamental right” for substantive due process rights purposes. *State v. Khamjoi*, 2003 Iowa App. LEXIS 779 at \*6 (Iowa Ct. App. Sept. 10, 2003) (citing *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 901-04, 106 S.Ct. 2317, 2320, 90 L.Ed. 2d 899, 904-06 (1986); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 254, 94 S.Ct. 1076, 1080, 39 L.Ed. 2d 306, 312 (1974)). The Iowa Court of Appeals, however, noted that the question of whether the right to intrastate travel remains unsettled. *Id.* at \*7.

The Sixth Circuit Court of Appeals examined whether the right to intrastate travel was a fundamental right in *Johnson v. City of Cincinnati*. *Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6<sup>th</sup> Cir. 2002), *cert. denied*, 535 U.S. 1034, 122 S.Ct. 1790, 152 L.Ed. 2d 649 (2003). The City passed an ordinance excluding individuals for a period of ninety days from drug exclusion zones for ninety days if arrested or taken into custody or one year if convicted. *Id.* at 487.

While noting that the United States Supreme Court had only addressed interstate travel, the court recognized that historically “state citizens ‘possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom.’” *Id.* at 496-97 (quoting *United States v. Wheeler*, 254 U.S. 281, 293, 41 S.Ct. 133, 134, 65 L.Ed. 270, \_\_\_\_\_ (1920)). Chief Justice Taney once stated that:

[f]or all the great purposes for which the Federal government was formed, we are one people, with one common country. We all are citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, *as freely as in our own States.*

*Id.* at 497 (quoting *Smith v. Turner*, 48 U.S. (7 How.) 283, 492, 12 L.Ed. 702, 790 (Taney, C.J. dissenting) ( 1849)) (Emphasis added). Justices Stevens, joined by Justices Souter and Ginsburg, recently stated that:

[i]t is apparent that an individual’s decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is “a part of our heritage.” *Kent v. Dulles*, 357 U.S. 116, 126, 78 S.Ct. 1113, 1118, 2 L.Ed. 2d 1204, 1210 (1958), or the right to move “to whatsoever place one’s own inclination may direct “identified in Blackstone’s Commentaries, 1 W. Blackstone, Commentaries on the Laws of England 130 (1765).

*Id.* (citing *City of Chicago v. Morales*, 527 U.S. 41, 54, 119 S.Ct. 1849, 1857-58, 144 L.Ed. 2d 67, 78-79 (1999)). The court found that the right

to localized travel was secured by substantive due process. *Id.* at 498.

The court quoted Justice Douglas as follows:

Freedom of movement, at home and abroad, is important for job and business opportunities – for cultural, political, and social activities – for all the commingling which gregarious man enjoys. Those will the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our faith in them, and against restraint, knowing that the risk of abusing liberty so as to give rise to punishable conduct is part of the price we pay for this free society.

*Id.* (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 519-20, 84 S.Ct. 1659, 1671, 12 L.Ed. 2d 992, 1005 (1964) (Douglas, J., concurring)). The court found a fundamental right to intrastate travel. *Id.* The court struck down the ordinance because it was not narrowly tailored. *Id.* at 506.

The Alaska Court of Appeals found a sentencing order exiling the defendant from his place of residence not narrowly tailored in *Peratrovich v. Alaska*. *Peratrovich v. Alaska*, 903 P.2d 1071, 1079 (Ak. Ct. App. 1995). The defendant was convicted of third degree sexual abuse of a minor. *Id.* at 1073. The trial court orally ordered the defendant to stay out of a county in which he resided while indicating that he might be able to return in five years. *Id.* at 1079. The written sentencing order stated that he could return to the residence with his probation officer's permission. *Id.* The appellate court determined that the trial court could not forbid the defendant from returning to his place of

residence without first affirmatively considering and giving good reason for rejecting lesser restrictions. *Id.*

The trial court in the present case ruled that section 692A.2A was similarly not narrowly tailored [Ruling]. The United States Supreme Court has stated that “[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the “evil” it seeks to remedy.” *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S.Ct. 2495, 2503, 101 L.Ed. 2d 420, 431 (1988) (Citation omitted)). A statute that shocks the conscience, or offends judicial concepts of fairness and human dignity fails to be narrowly tailored. *In re Interest of K.M.*, 653 N.W.2d 602, 607 (Iowa 2002).

Section 692A.2A is not narrowly tailored. Dr. Dave McEchron, a psychologist whose practice consisted of treatment of sex offenders, testified that no hard data existed showing what distance was considered “safe” for an offender to stay away from children [Ruling]. Ron Mullin, a parole/probation officer with experience as a counselor in the Mount Pleasant facility agreed that no such studies existed [Ruling]. Mullin also knew of no guidelines regarding a “safe distance” nor any studies or literature indicating that the 2000 feet guaranteed safety against an offender [Ruling].

Indeed, McEchron and Mullin expressed concerns that the residency restrictions could cause harm [Ruling]. Dr. McEchron believed that a life long restriction would not motivate an individual in

treatment. The offender could easily become depressed which would make him more likely to reoffend [Ruling]. The restriction could prevent the offender from residing with his family [Ruling]. This deprived the offender of necessary family support [Ruling]. Mullin opined that an external control such as a residential restriction needed to be relaxed later so that the offender could gain more internal control [Ruling]. He foresaw that an offender would have difficulties in finding an appropriate residence while on probation or parole [Ruling]. Hansen, a third State witness and the enforcement officer for the sexual registry, expressed concern that offenders would chose not to register if he knew that he could be prosecuted for revealing his address [Ruling].

Section 692A.2A offends concepts of fairness and human dignity. No evidence exists that the 2000 foot restrictions provides any safety from an offender. Instead, the statute will likely cause harm. The statute violates the substantive due process of the offenders.

**B. SECTION 692A.2A VIOLATES THE PROCEDURAL DUE PROCESS RIGHTS OF KEITH AND OTHER OFFENDERS.**

The Fourteenth Amendment of the United States Constitution provides that “no State . . . deprive any person of life, liberty , or property, without due process of law . . . U.S. CONST. amend. XIV. See *also* Iowa Const. art. I, sec. 9. Due process mandates that a judicial proceeding be fundamentally fair. *In re Detention of Morrow*, 616 N.W.2d 544, 549 (Iowa 2000). This Court has stated that “[I]t is well-established that procedural due process ‘imposes constraints on

governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the . . . Fourteenth Amendment." *F.K. v. Iowa Dist. Ct.*, 630 N.W.2d 801, 808 (Iowa 2001) (citing *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed. 2d 18, 33 (1976)).

The Iowa courts utilize a two-step test in a due process inquiry. First, the court determines whether the deprivation implicates a liberty or property interest. *F.K.*, 630 N.W.2d at 801 (*In re Interest of A.H.*, 516 N.W.2d 867, 870 (Iowa 1994)). . As discussed above, the statute implicates the offenders' liberty right to reside with their families. Second, the court must determine what procedure is due. *Id.*

Under the second prong, the court must balance the following three factors:

- (1) The private interest that will be affected by the State's actions;
- (2) the State's interest; and
- (3) the risk that the current procedure will lead to erroneous deprivation of the interests at stake and the probable value, if any, of additional or different procedural safeguards.

*Id.* at 808 (citing *In re A.H.*, 516 N.W.2d at 870).

Keith and the other offenders have a private interest that will be affected by enforcement of section 692A.2A. The section prohibits him from residing with his family. Nancy, Keith's wife, searched for residences that complied with the statute [Ruling]. Most of the residences were unaffordable on the family's limited income [Ruling].

Other limitations, such as Nancy's inability to drive and the unreliability of the family vehicle, excluded other residences. Dr. McEchron opined that the residential restriction could prevent other offenders from residing with their families [Ruling]. Keith agrees that the State has an interest in protecting potential victims. He believes, however, that procedural safeguards are needed to protect erroneous deprivations of offenders' rights.

The Alabama Court of Criminal Appeals examined procedural safeguards in the case of *J.L.N. v. Alabama*. *J.L.N. v. Ala.*, 2002 Ala. Crim. App. LEXIS 231 (Ala. Crim. App. 2002). The defendant was convicted of second degree rape of his underage girlfriend. *Id.* at \*1. He moved in with his girlfriend and her mother after his incarceration. *Id.* at \*2. The State charged him with violation of a Alabama Code section 15-20-26(b). *Id.* The section states that “[u]nless otherwise exempted by law, no adult criminal sex offender shall establish residence or any other living accommodation within 1,000 feet of the property on which any of his or her former victims, or the victims’ immediate family members reside.” *Id.* (citing Ala. Code Sec. 15-20-26(b) (1975)). The defendant pled guilty but reserved his right to challenge the trial court’s denial of his motion to dismiss. *Id.*

The appellate court reversed the conviction. *Id.* at \*33. The court first acknowledged that the Due Process Clause of the United States Constitution protected the right to marry. *Id.* at \*24-25 (citing *Planned*

*Parenthood v. Casey*, 505 U.S. 833, 848-49, 112 S.Ct. 2791, 2805, 120 L.Ed. 2d 674, 696, (1992); *Zablocki v. Redhail*, 434 U.S. 374, 383-85, 98 S.Ct. 673, 679-81, 54 L.Ed. 2d 618, 628-30 (1978); *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 1824, 18 L.Ed. 2d 1010, 1018 (1967) and omitting last citation). It noted that not every statute affecting marriage must be subjected to strict scrutiny. *Id.* (citing *Zablocki*, 434 U.S. at 386, 98 S.Ct. at 681). The regulation must significantly interfere with the decision to enter into marriage. *Id.*

The court ruled that the statute interfered directly and substantially with the defendant's right to marry. *Id.* at \*31-32. The statute provided no procedure by which the defendant, and other sex offenders, could petition the court for an exemption. *Id.* at \*31. The statute created a conclusive presumption that no circumstances existed where it might be appropriate for the sex offender to interact with his victim. *Id.* In addition, the statute allowed for no individualized determinations when the offender and the victim wished to marry. *Id.* The United State Supreme Court has looked at such irrebuttal presumptions with disfavor under the Due Process Clause. *Id.* (citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640, 94 S.Ct. 791, 796, 39 L.Ed. 2d 52, 60 (1974)).

Section 692A.2A also provides no procedure by which an offender can petition the court for an exemption. See Iowa Code Sec. 692A.2A (2003). It allows for no individualized determinations. *Id.* It

merely presumes that the offender will be able to locate a residence within the restrictions and be able to reside with his family.

Two more factors are important when there is a disruption of a marital or parent-child relationship: “the degree of deprivation and the deprivation’s possible length.” *Id.* (citing *Mathews*, 424 U.S. at 341, 96 S.Ct. at 906, 47 L.Ed. 2d at 37). Clearly, the degree of deprivation is great - - Keith, and others like him, cannot “establish a home, and bring up [their] children.” *See Zablocki v. Redhail*, 434 U.S. 374, 384, 98 S.Ct. 673, 680, 54 L.Ed. 2d 618, 629 (1978) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 2d 1042, 1045 (1923)). The section specifies no time period for the restriction. *Cf. United States v. Cothran*, 855 F.2d. 749, 752 (11<sup>th</sup> Cir. 1988); *Cobb v. Mississippi*, 437 So.2d 1218, 1221 (Ms. 1983); *Martin v. Bd. of Parole*, 957 P.2d 1210, 1216-17 (Or. 1998) (where the defendant was barred merely for the period or probation or parole). The deprivation can be for forever. The residency requirement violates procedural due process.

C. SECTION 692A.2A VIOLATES THE EX POST FACTO CLAUSES OF THE UNITED STATES AND IOWA CONSTITUTIONS.

Article I, section 10 of the United States Constitution states that “[n]o State shall enter into any . . . ex post facto Law . . . .” U.S. Const. art. I. sec. 10. *See also* Iowa Const. art. I, sec. 21. The United States Supreme Court has stated “that any statute which . . . which makes more burdensome the punishment for the crime, after its commission . . . .”

*Schreiber v. State*, 2003 Iowa Sup. LEXIS 141 at \*5 (Iowa July 16, 2003) (citing *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S.Ct. 68, 68, 70 L.Ed. 216, 217 (1945)). See also *State v. Corwin*, 616 N.W.2d 600, 601 (Iowa 2000). A statute is determined to be punitive when “its intent is to punish for past activity and not merely to impose a restriction on someone ‘as a relevant incident to a regulation of a present situation.’” *Id.* at \*5-6 (quoting *State v. Pickens*, 558 N.W.2d 396, 398 (Iowa 1997) (quoting *DeVeau v. Braisted*, 363 U.S. 144, 160, 80 S.Ct. 1146, 1155, 4 L.Ed. 2d 1109, 1120 (1960))).

The *Scheiber* court adopted the following rationale from the United States Supreme Court case of *Smith v. Doe* in which the Court upheld a sex offender registry:

We must first ascertain whether the legislature meant the statute to establish civil proceedings. If the intention of legislature was to impose punishment that ends the inquiry. If, however, the intent was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in its purpose or effect as to negate the State’s intention to deem it civil. Because we ordinarily defer to the legislature’s stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.

*Id.* at \*7 (quoting *Smith v. Doe*, 538 U.S. 84, \_\_\_\_\_, 123 S.Ct. 1140, 1146-47, 155 L.Ed. 2d 164, 176 (2003)). In determining whether the registry statute violated the ex post facto clause, the *Smith* Court looked at whether the statute set a scheme that:

- (1) ha[d] been regarded in our history and traditions as a punishment;
- (2) imposed[] an affirmative disability or restraint;
- (3) promot[ed] the traditional aims of punishment;
- (4) ha[d] a rational connection to a nonpunitive purpose; or
- (5) is excessive with respect to this purpose.

*Doe*, 538 U.S. at \_\_\_\_\_, 123 S.Ct. at 1149, 155 L.Ed. 2d at 180.

The trial court found that the residency restriction was comparable to banishment that had been historically regarded as punishment [Ruling]. The court quoted the case of *Kennedy v. Mendoza-Martinez* as followed:

Reference to history here is particularly appropriate . . . banishment and exile have throughout history been used as punishment . . . Banishment was a weapon in the English legal arsenal for centuries (Citation omitted) but it was always adjudicated a harsh punishment even by men who were accustomed to brutality of the administration of criminal justice . . .(Citation omitted).

*Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 170, 83 S.Ct. 554, 568, 9 L.Ed. 2d 644, 662 (1963). See also *Smith v. Doe*, 538 U.S. at \_\_\_\_\_, 123 S.Ct. at 1150, 155 L.Ed. 2d at 179. The Iowa Supreme Court has similarly condemned the punishment of banishment. *Burnstein v. Jennings*, 231 Iowa 1280, 1282, 4 N.W.2d 428, 429 (1942). In addition, section 692A.2A clearly imposes an affirmative disability and restraint. The section severely limits where an offender can reside. Iowa Code Sec. 692A.2A (2003).

While the trial court did not specifically address whether the restriction promoted the traditional aims of punishment, evidence

suggests that it was to, at least, promote deterrence [Tr. p. 34]. The court did find a rational connection to a nonpunitive purpose - - public safety [Ruling]. The court, however, found it excessive for that purpose. No hard data existed showing what distance was considered “safe” for an offender to stay away from children [Ruling]. No guidelines regarding a “safe distance” nor any studies or literature indicating that the 2000 feet guaranteed safety against an offender [Ruling]. The law unduly punished the offenders by severely restricting where they could live [Ruling].

Further, the law binds the offender for life. *Cf. United States v. Cothran*, 855 F.2d 749, 752 (11<sup>th</sup> Cir. 1988); *Cobb v. Mississippi*, 437 So.2d 1218, 1221 (Ms. 1983); *Martin v. Bd. of Parole*, 957 P.2d 1210, 1216-17 (Or. 1998) (where the defendants were barred from an area for the period of their probation or parole). The law allows for no exemptions. *See, eg., Cothran*, 855 F.2d at 750 (where the defendant could enter the area with the permission of his probation officer); *Cobb*, 437 So. 2d at 1219 (where the defendant can enter the area with notification to the sheriff). *Cf. Peratrovich v. Alaska*, 903 P.2d 1071, 1079 (Ak. Ct. App. 1995) (remanded for resentencing even though the defendant could enter the prohibited area with written permission of his probation officer); *Ohio v. Burnett*, 755 N.E.2d 857, 859 (Oh. 2001) (reversed although individual could obtain variance). Section 692A.2A

violates the ex post facto clauses of the United States and Iowa Constitutions.

D. SECTION 692A.2A VIOLATES THE RIGHT AGAINST SELF-INCRIMINATION.

The Fifth Amendment of the United States Constitution provides in part, that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . .” U.S. CONST. amend. V. The Fourteenth Amendment makes the Fifth Amendment applicable to the states. U.S. CONST. amend. XIV.; *Schertz v. State*, 380 N.W.2d 404, 409 (Iowa 1985),

The privilege allows a person “not to answer official questions put to him in any proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.” *In re Interest of C.H.*, 652 N.W.2d 144, 148 (Iowa 2002) (citing *Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S.Ct. 1136, 1141, 79 L.Ed. 2d 409, 418 (1973) quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38 L.Ed. 2d 274, 281 (1973)). The Fifth Amendment is violated “[w]hen the State ‘compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered.’” *Id.* at 148-49 (citing *In re Interest of E.H. III.*, 578 N.W.2d 243, 249 (Iowa 1998) quoting *Lefkowitz v. Cunningham*, 431 U.S. 801, 805, 97 S.Ct. 2132, 2135, 53 L.Ed. 2d 1, 7 (1977)).

Iowa Code section 692A.2 requires released sex offenders to register. Iowa Code section 692A.2 (2003). Failure to do so exposes

the offender to a charge of an aggravated misdemeanor for the first offense and a D felony for any subsequent failure. Iowa Code Sec. 692A.7 (2003). Similarly, an offender, as Keith learned, faces an aggravated misdemeanor charge if he attempts to register an address within two thousand feet of a school or child care facility. Iowa Code Sec. 692A.2A(3) (2003). Hansen, the law enforcement officer designated to register offenders in Washington County, himself admitted that an offender, knowing that he could be prosecuted for revealing his address, would choose not to register [Ruling]. This would clearly defeat the purpose of section 692A.2.

The combined effect of the two statutes is to force the offender to surrender his constitutional right against self-incrimination or face a potent penalty. Section 692A.2A violates the right against self-incrimination.

### CONCLUSION

On the above grounds the Iowa Civil Liberties Union requests that the Court affirm the grant of Keith Seering's Motion to Dismiss.

---

Catherine K. Levine  
3110 S.W. 29<sup>th</sup> Street  
Des Moines, Iowa 50321  
(515) 244-4813  
Fax: (515) 244-4813 \*51

CERTIFICATION

The undersigned certifies that, pursuant to Iowa R. App. P. 6.14(5)(b) she has conducted a diligent search of the attached cases and has fully disclosed any subsequent histories of the cases.

---

Catherine K. Levine